

MEDICAL CONTESTED CASE HEARING NO. 16004

**DECISION AND ORDER**

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and the Rules of the Texas Department of Insurance, Division of Workers' Compensation. For the reasons discussed herein, the Hearing Officer determines that the preponderance of the evidence is not contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to a postural lateral interbody fusion for the compensable injury of (Date of Injury).

**STATEMENT OF THE CASE**

A contested case hearing was held on October 5, 2015 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to a postural lateral interbody fusion for the compensable injury of (Date of Injury)?

**PARTIES PRESENT**

Petitioner/Claimant appeared and was assisted by ML, ombudsman.

Respondent/Carrier was represented by CF, attorney.

**EVIDENCE PRESENTED**

The following witnesses testified:

For Claimant: Claimant.

For Carrier: None.

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits: HO-1 and HO-2.

Claimant's Exhibits: C-1 through C-15.

Carrier's Exhibits: CR-A through CR-H.

## **DISCUSSION**

On (Date of Injury), Claimant was working as a forklift operator and as he was physically lifting boxes, he felt pain to his groin and lower back. Claimant testified that he has had physical therapy, diagnostic studies, and recently had an epidural steroid injection to his lower back.

Claimant maintains that the recommended medical procedure of a postural lateral interbody fusion is medically necessary as a result of the compensable injury and relies on his testimony and various medical records. The requested surgical procedure was denied by the Carrier's utilization review agents and appealed to an IRO who upheld the Carrier's denial.

The IRO reviewer, a neurosurgeon, opined that the "patient's updated imaging from April of 2015 failed to identify any significant disc space collapse, spondylolisthesis, or any evidence of motion segment instability that would meet guideline recommendations regarding lumbar spinal fusion at L5-S1. Although the patient continued to be symptomatic despite conservative treatment, there were no clear indications for lumbar spinal fusion based on guideline recommendation. Furthermore, the clinical documentation did not include any preoperative psychological evaluation..."

Texas Labor Code Section 408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence based medicine or, if evidence based medicine is not available, then generally accepted standards of medical practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent with evidence based medicine if that evidence is available. Evidence based medicine is further defined in Texas Labor Code Section 401.011 (18a) to be the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines. The Commissioner of the Division of Workers' Compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused, and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code Section 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code Section 413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines (ODG), and such treatment is presumed to be health care reasonably required as defined in the

Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG. Also, in accordance with Division Rule 133.308(s), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

Regarding the recommended interbody spinal fusion, the ODG states as follows:

Patient Selection Criteria for Lumbar Spinal Fusion:

- (A) *Recommended* as an option for the following conditions with ongoing symptoms, corroborating physical findings and imaging, and after failure of non-operative treatment (unless contraindicated e.g. acute traumatic unstable fracture, dislocation, spinal cord injury) subject to criteria below:
- (1) Spondylolisthesis (isthmic or degenerative) with at least one of these:
    - (a) instability, and/or
    - (b) symptomatic radiculopathy, and/or
    - (c) symptomatic spinal stenosis;
  - (2) Disc herniation with symptomatic radiculopathy undergoing a third decompression at the same level;
  - (3) Revision of pseudoarthrosis (single revision attempt);
  - (4) Unstable fracture;
  - (5) Dislocation;
  - (6) Acute spinal cord injury (SCI) with post-traumatic instability;
  - (7) Spinal infections with resultant instability;
  - (8) Scoliosis with progressive pain, cardiopulmonary or neurologic symptoms, and structural deformity;
  - (9) Scheuermann's kyphosis;
  - (10) Tumors.
- (B) *Not recommended* in workers' compensation patients for the following conditions:
- (1) Degenerative disc disease (DDD);
  - (2) Disc herniation;
  - (3) Spinal stenosis without degenerative spondylolisthesis or instability;
  - (4) Nonspecific low back pain.
- (C) *Instability criteria*: Segmental Instability (objectively demonstrable) - Excessive motion, as in isthmic or degenerative spondylolisthesis, surgically induced segmental instability and mechanical intervertebral collapse of the motion segment and advanced degenerative changes after surgical discectomy, with relative angular motion greater than 15 degrees L1-2 through L3-4, 20 degrees L4-5, 25 degrees L5-S1. Spinal instability criteria

includes lumbar inter-segmental translational movement of more than 4.5 mm. (Andersson, 2000) (Luers, 2007) (Rondinelli, 2008)

- (D) After failure of two discectomies on the same disc [(A)(2) *above*], fusion may be an option at the time of the third discectomy, which should also meet the ODG criteria. (See ODG Indications for Surgery -- Discectomy.)
- (E) Revision Surgery for failed previous fusion at the same disc level [(A)(3) *above*] if there are ongoing symptoms and functional limitations that have not responded to non-operative care; there is imaging confirmation of pseudoarthrosis and/or hardware breakage/malposition; and significant functional gains are reasonably expected. Revision surgery for purposes of pain relief must be approached with extreme caution due to the less than 50% success rate reported in medical literature. Workers compensation and opioid use may be associated with failure to achieve minimum clinically important difference after revision for pseudoarthrosis (Djurasovic, 2011) There is low probability of significant clinical improvement from a second revision at the same fusion level(s), and therefore multiple revision surgeries at the same level(s) are not supported.
- (F) *Pre-operative clinical surgical indications* for spinal fusion should include all of the following:
  - (1) All physical medicine and manual therapy interventions are completed with documentation of reasonable patient participation with rehabilitation efforts including skilled therapy visits, and performance of home exercise program during and after formal therapy. Physical medicine and manual therapy interventions should include cognitive behavioral advice (e.g. ordinary activities are not harmful to the back, patients should remain active, etc.);
  - (2) X-rays demonstrating spinal instability and/or myelogram, CT-myelogram, or MRI demonstrating nerve root impingement correlated with symptoms and exam findings;
  - (3) Spine fusion to be performed at one or two levels;
  - (4) Psychosocial screen with confounding issues addressed; the evaluating mental health professional should document the presence and/or absence of identified psychological barriers that are known to preclude post-operative recovery;
  - (5) For any potential fusion surgery, it is recommended that the injured worker refrain from smoking for at least six weeks prior to surgery and during the period of fusion healing; (Colorado, 2001) (BlueCross BlueShield, 2002)
  - (6) There should be documentation that the surgeon has discussed potential alternatives, benefits and risks of fusion with the patient;

(7)For average hospital LOS after criteria are met, see Hospital length of stay (LOS).

The evidence failed to establish that the treating physician addressed the ODG patient selection criteria listed above for the proposed procedure. The treating physician did not discuss how Claimant fell outside of these criteria, nor did he provide evidence-based medicine other than the medical records to show the necessity of the proposed procedure. Although the Claimant has admitted a psychological evaluation, this evaluation was performed after the IRO rendered his opinion. Therefore, the medical evidence presented in support of the necessity of the proposed procedure is insufficient and is not supported by evidence-based medicine. The preponderance of the evidence is not contrary to the decision of the IRO that Claimant is not entitled to a postural lateral interbody fusion for the compensable injury of (Date of Injury).

The Hearing Officer considered all of the evidence admitted. The Findings of Fact and Conclusions of Law are based on an assessment of all of the evidence whether or not the evidence is specifically discussed in this Decision and Order.

### **FINDINGS OF FACT**

1. The parties stipulated to the following facts:
  - A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
  - B. On (Date of Injury), Claimant was the employee of (Employer), Employer.
  - C. On (Date of Injury), Employer provided workers' compensation insurance with New Hampshire Insurance Company, Carrier.
  - D. On (Date of Injury), Claimant sustained a compensable injury.
2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. The IRO determined that the requested surgical procedure was not health care reasonably required for the compensable injury of (Date of Injury).
4. Claimant did not present evidence-based medical evidence contrary to the IRO decision.
5. A postural lateral interbody fusion is not health care reasonably required for the compensable injury of (Date of Injury).

## **CONCLUSIONS OF LAW**

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the decision of the IRO that a postural lateral interbody fusion is not health care reasonably required for the compensable injury of (Date of Injury).

## **DECISION**

Claimant is not entitled to a postural lateral interbody fusion for the compensable injury of (Date of Injury).

## **ORDER**

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE COMPANY**, and the name and address of its registered agent for service of process is:

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, STE. 620  
AUSTIN, TX 78701-3218**

Signed this 9<sup>th</sup> day of October, 2015.

Teresa G. Hartley  
Hearing Officer